Petition

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In The

Supreme Court of the United States

OCTOBER TERM, 1981

No.

PEOPLE OF THE STATE OF NEW YORK, *Petitioner*,

— *v.* —

THEODORE PEPPER

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

SOL GREENBERG
DISTRICT ATTORNEY OF
ALBANY COUNTY
Albany County Court House
Albany, New York 12207
(518) 445-7555

GEORGE H. BARBER,
Of Counsel
Assistant District Attorney
Albany County Court House
Albany, New York 12207

QUESTIONS PRESENTED

Does the decision of the New York State Court of Appeals, *People* v. *Pepper* violate the rights of the People of the State of New York under the 9th and 14th Amendments of the U.S. Constitution and the inherent right of the People of the State of New York to personal safety through the release of self-admitted felons who were questioned by police in the absence of an attorney after a complaint was filed or warrant for the felon's arrest was issued?

Does *People* v. *Pepper* violate the rights of the People of the State of New York under Amendments 9 and 14 of the U.S. Constitution, and the inherent right of the People of the State of New York to personal safety, by its retroactive application of the prior State of New York Court of Appeals case of *People* v. *Samuels*, 49 NY2d 218, which compels the release of an already convicted felon because he had made statements to police in the absence of an attorney after a complaint had been filed or a warrant of arrest had been issued?

Is *People* v. *Pepper* in contravention of the U.S. Constitution as interpreted by this Court in *Faretta* v. *California*, 422 US 806, and the reliance by Police thereon, in that the decision in *People* v. *Pepper* requires a defendant to have an attorney present before he may be questioned by police where a complaint has been filed or a warrant issued?

PARTIES

The People of the State of New York and Theodore Pepper are the only parties herein.

TABLE OF CONTENTS

Page

Table of Authorities i

Questions Presented ..... A

Parties ..... A

Opinions Below 1

Statement of Material Facts 2

POINT I — *People* v. *Pepper* contravenes the Sixth Amendment as interpreted by this Court in *Faretta* v. *California* and reliance by police thereon and must be held unconstitutional 12

POINT II — *People* v. *Pepper* violates the Ninth and Fourteenth Amendments of the United States Constitution and the right of the public thereunder to personal safety and should be held unconstitutional 15

Conclusion 18

APPENDIX:

New York Court of Appeals Opinion, *People* v. *Pepper* ... A1

New York Appellate Division of Supreme Court Opinion, *People* v. *Pepper* A11

New York County Court Opinion by Hon. John J. Clyne . A14

Grand Jury Indictment A19

Signed Statement of Defendant Pepper A23

New York Court of Appeals Remittitur A28

Table of Authorities:

Cases:

Faretta v. *California*, 422 US 806 (1975) ..... A, 12, 13, 14

Gannett Co. v. *DePasquale*, 443 US 368 (1979) 14

Griswold v. *Connecticut*, 381 US 479 (1965) 15

Page

Illinois v. *Allen*, 397 US 337 (1970) 13

Jackson v. *Denno*, 378 US 391 (1964) 7

Jenkins v. *Delaware*, 395 US 213 (1969) 10

Marbury v. *Madison*, 1 Cranch 137 (1803) 16

Michigan v. *Tucker*, 417 US 433 (1974) 7, 9

Miranda v. *Arizona*, 384 US 436 (1966) 14

Myers v. *United States*, 272 US 52 (1926), 47 S. Ct. 21 ... 16

People v. *Babcock*, 64 AD2d 769 (1978) 5

People v. *Burd*, 18 NY2d 447 (1966) 4

People v. *Droz*, 39 NY2d 457 (1976) 4

People v. *Kaiser*, 21 NY2d 86 (1967) 11

People v. *McQueen*, 18 NY2d 337 (1966) 11

People v. *Samuels*, 49 NY2d 218 (1980) .. A, 4, 5, 11, 14, 17

People v. *Sayers*, 22 NY2d 571 (1968) 10

People v. *Stockford*, 24 NY2d 146 (1969) 5

People v. *Torres*, 53 NY2d 213 (1981) 5

Poe v. *Ullman*, 367 US 497 (1961) 16

Powell v. *Alabama*, 287 US 45 (1932) 16

Roe v. *Wade*, 410 US 113 (1973) 16

Simmons v. *United States*, 390 US 377 (1968) 4

Snyder v. *Massachusetts*, 291 US 97 (1933) 16

Stein v. *New York*, 346 US 156 (1952); *overruled on other grounds, Jackson* v. *Denno*, 378 US 391 (1964) . 7, 8

Stone v. *Powell*, 428 US 465 (1976) 6, 9

Stovall v. *Denno*, 388 US 293 (1967) 9

United States v. *Cook*, 311 F Supp 618 (D.C. Pa., 1970) .. 15

United States v. *Janis*, 428 US 433 (1976), *reh. den.* 429 US 874 ..... 7, 9

Page

United States v. *Mohabir*, 624 F2d 1140 (1980) 13

United States v. *Peltier*, 422 US 531 (1975) 7

United States v. *Williams*, 622 F2d 830 7

Williams v. *United States*, 401 US 646 (1971) 9

Articles/Texts:

Ball, *Good-Faith And The Fourth Amendment: The "Reasonable" Exception To The Exclusionary Rule*, 69 J. Crim. L. & Criminology 635 (1978) 6

Friendly, Henry, *Benchmarks*, 260-62 (1967) 6

Wright, Charles Alan, *Must The Criminal Go Free If The Constable Blunders?*, 50 Tex. L. Rev. 736 6

Treatises:

New York Jurisprudence, Second Series, Volume 9, Constitutional Law Section 225 17

Statutes:

NY Criminal Procedure Law §1.20, Subd. 17, (McKinney) 5

N.Y. Penal Law §130.16 (McKinney) 10, 11

U.S.C.A., Title 28, §1257(3) 1

U.S. Constitution:

Amendment 6 14

Amendment 9 ..... 2, 15, 16

Amendment 14 ..... 2, 15, 16, 17

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PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

OPINIONS BELOW

The opinion of the State of New York Court of Appeals decided June 16, 1981 in 53 NY2d 213, is attached hereto in the Appendix at pages A1-A10. The opinion of the New York State Appellate Division of the Supreme Court, 3rd Department, decided June 26, 1980 is in 76 AD2d 1006 and is in the Appendix herein at pages A11-A13. The decision of Albany County Court Judge John J. Clyne dated June 21, 1979 is in the Appendix at pages A15-A18.

The order of the State of New York Court of Appeals, which is called a remittitur, was entered in the Office of the Albany County Court Clerk on June 22, 1981 and is in the Appendix at page A28. The jurisdiction of the Supreme Court is invoked under Title 28 U.S.C.A. § 1257(3) on the grounds that the

State of New York Court of Appeals decision in *People* v. *Pepper* violates the rights of the People of New York State under Amendments 9 and 14 of the U.S. Constitution and the inherent right of the People of the State of New York to personal safety.

STATEMENT OF MATERIAL FACTS

On November 16, 1978, about 8:00 P.M., the Honorable Kevin Moss, Justice of the Peace, Town of Guilderland, after reviewing a felony complaint and statement of the complaining witness, issued an arrest warrant for Theodore Pepper. The next morning investigators of the State Police arrived at a Chrysler-Plymouth Dealership operated by Theodore Pepper, and there he was given *Miranda* warnings. As found by the Supreme Court of the State of New York, Appellate Division, 3rd Department, and stated in their opinion in the Appendix herein at page A11:

> "The warrant was not executed, nor was the defendant told of its existence, nor was he placed under arrest. Rather, the defendant agreed to meet the officers at their barracks to give a statement and went there voluntarily, driving his own car and not in the company of the officers."

At the State Police barracks, defendant admitted sexual acts about June or July 1977 with one Kathleen Valenti, then age 11. A written statement was made by the defendant who corrected spellings and then signed the statement. Thereafter, at his request, he was allowed to call an attorney, and within two hours, about 4 P.M., he was arraigned in Justice Court by the Hon. Kevin Moss who had also issued the arrest warrant. The arrest warrant was never used to arrest Theodore Pepper and the police never informed the defendant that it had been issued.

The Defendant was indicted on November 22, 1978 by a Grand Jury and this five count indictment is in the Appendix herein at pages A19-A22. Defendant made a motion to suppress his statement which constituted a confession. A Suppression Hearing was held before Judge John J. Clyne who

denied the motion to suppress defendant's statement; his decision is in the Appendix at pages A14-A18. During the suppression hearing, the defendant was asked and replied at R387:

> "Q. And you volunteered to freely give a statement to the police concerning one Mary Angus, is that correct?
>
> A. Yes."

At the suppression hearing, defendant testified that he touched Kathleen lightly on her breast and she lightly fondled his penis. The defendant testified he told Detective Connelly "basically what's in the statement" which his attorney stated "speaks for itself." (R395) Defendant's statement was received in evidence as Exhibit 6 and is in the Appendix herein at pages A23-A27.

On June 22, 1979 the defendant pled guilty to the Sodomy count of the five count indictment (R441, 442) in full satisfaction thereof. The defendant was asked by Judge Clyne: "I assume you are pleading guilty because you are, in fact, guilty of the crime charged?". The defendant replied, "Yes, Your Honor." (R440-441) Judge Clyne asked and the defendant relied at R441-442:

> "THE COURT: The indictment charges in the first count thereof that sometime during the month of June through September, 1977, in the parking lot of the A&P on Johnson Road in the Town of Colonie you, then being eighteen years old or more, did engage in deviate sexual intercourse with another person less than fourteen years old, namely you, at the aforesaid date, time and place, being aided by the Defendant Mary Angus, engaged in deviate sexual intercourse consisting of placing your penis in the mouth of one Kathleen Valenti, a person less than fourteen years of age. Is that correct?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Were you there at the time and place?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Did you do that?
>
> THE DEFENDANT: Yes, Your Honor.

THE COURT: How old were you at the time?

THE DEFENDANT: Forty-one.

THE COURT: Theodore Pepper, I ask you: How do you plead to the crime of sodomy in the second degree, a Class D. felony?

THE DEFENDANT: Guilty, Your Honor."

Even though defendant told the police facts proving his guilt, and later admitted substantially the same facts again at the Suppression Hearing and again when he pled guilty before Judge Clyne, the People are forever precluded from proving any of the above at the defendant's trial because of various court decisions. This court's decision in *Simmons* v. *U.S.*, 390 US 377, prevents the People from using defendant's statements at the Suppression Hearing. Defendant's statements on pleading guilty cannot be used under *People* v. *Burd*, 18 NY2d 447, 450 and *People* v. *Droz*, 39 NY2d 457, 463. The defendant's signed statements, given to police, cannot be used under *People* v. *Pepper*, which applied the rule of *People* v. *Samuels*, 49 NY2d 218, retroactively, even though *Samuels* was decided fourteen months after defendant signed a statement and six months after he pled guilty.

Here the "fact-finding process" at trial is not affected in any way since defendant admitted his guilt to police under oath at a Suppression Hearing when represented by an attorney and again when he pled guilty in open court. At sentencing even defendant's attorney stated:

> "Here is a man who now stands before you for having admitted committing an act which, really, saddens and shocks the conscience of the Court and myself."

There is no question that the truth finding function of a court was not impaired in any way by police since defendant has admitted his criminal acts constituting sodomy under the New York State Penal Law on three occasions. It would seem under decisions of this Court that a rule such as *People* v. *Samuels* would not be applied retroactively since the fact

finding process was not interfered with. Unfortunately, the New York State Court of Appeals is interpreting a New York State statute, Criminal Procedure Law Section 1.20 Subdivision 17, which provides:

> "A criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court."

Although this section was effective September 1, 1971, it was not until January 15, 1980, when *People* v. *Samuels*, 49 NY2d 218, was decided, that the Court of Appeals stated that where an accusatory instrument was filed a defendant must have an attorney present before he can be questioned. Between 1971 and 1980, many defendants tried to obtain permission to appeal to the Court of Appeals, but were denied permission where they had been questioned in the absence of an attorney after an accusatory instrument had been filed. In a criminal case in New York State, on an application to appeal made to the Court of Appeals, one judge of that court is assigned and decides the leave to appeal application. An Appellate Division judge may also grant leave. Actually, Court of Appeals, Justice Wachtler denied leave in *People* v. *Torres*, and three years later granted leave on a reapplication after *People* v. *Samuels* was decided. *See* 53 NY2d 213. Court of Appeals Justice Jasen also denied leave in *People* v. *Babcock*. *See* 64 AD2d 769. In New York State, the Court of Appeals only hears criminal appeals by permission and this question was never decided until *People* v. *Samuels*. Police agencies throughout the State of New York relied on the Court of Appeals decision in *People* v. *Stockford*, 24 NY2d 146, which held issuance of a warrant did not require that defendant have an attorney present when questioned. The Court of Appeals decision herein by Judge Fuchsberg at page 6 maintains "our decision need not have taken the People by surprise" since it was foreshadowed. *People* v. *Pepper*, 53 NY2d, at 222. This is also stated by Judge Gabrielli at page 223 of his concurring opinion. Unfortunately,

police officers in New York State tried to go by what the Court of Appeals had already stated when they questioned Mr. Pepper.

Usually when courts suppress an incriminating statement of a defendant, it is because police have knowingly impaired a defendant's constitutional rights already defined by courts. Here police followed all of the then existing decisions of this Court and New York State's highest court. At the time defendant Pepper was questioned, the New York State Police instructed its officers to obtain an arrest warrant whenever possible before making an arrest. In keeping with this policy, the State Police did obtain an arrest warrant for defendant Pepper before talking with him so as to first insure an independent judicial determination of his criminal activity.

This Court has regarded such police action taken in a reasonable good-faith as being within the so-called "good-faith" exception to the exclusionary rule. *See Stone* v. *Powell*, 428 US at 490, and n. 29.

This "good-faith" exception has been supported by numerous commentators. Commentator Ball has stated that, "when an officer acts in the good-faith belief that his conduct is constitutional and where he has a reasonable basis for that belief, the exclusionary rule will not operate." Ball, *Good-Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, (1978). Professor Charles Alan Wright, in his article *Must The Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736, states at 740: "the criminal is to go free if the constable has flouted the fourth amendment, but not if he has made an honest blunder." Judge Henry Friendly in his book *Benchmarks*, at 260-62 (1967), cited by this Court in *Stone*, 428 US, at 490 n. 29, has suggested limiting the exclusion of evidence to "the fruit of activity intentionally or flagrantly illegal."

The "good-faith" exception also finds support in logic. The exception provides a sensible approach to the problems presented by the exclusionary rule, for "[i]t allows us to come to a just result without cutting away at the Fourth Amendment and, at the same time, without removing the deterrent effect of the Exclusionary Rule." *United States* v. *Williams*, 622 F.2d 830, 847 (J. Hill, Concurring). Moreover, as the majority in *Williams* stated, at 842:

> It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was *legal* by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all. The Supreme Court recognized this in *Janis* in admitting evidence obtained in good faith under a warrant later found detective. '[T]he officers here were clearly acting in good faith, . . . a factor that the Court has recognized reduced significantly the potential deterrent effect of exclusion. *See Michigan* v. *Tucker*, 417 US, at 447; *United States* v. *Peltier*, 422 US, at 539.' 428 US, at 459 n. 35. (emphasis in original)

Most importantly, however, the "good-faith" exception is supported in the decisions of this Court and others. In *Michigan* v. *Tucker*, 417 US 433 (1974) this Court refused to exclude the testimony of a witness located through statements made by the accused during police interrogation administered "in complete good faith" but without proper *Miranda* warnings. This Court in *United States* v. *Janis*, 428 US 433 (1976), *reh. den.*, 429 US 874, refused to suppress evidence that had been obtained by state police in good-faith reliance on a search warrant later found defective.

This case is certainly a far cry from *Stein* v. *New York*, 346 US 156, *overruled on other grounds*, *Jackson* v. *Denno*, 378 US 391. In *Stein*, two of the petitioners had been interrogated numerous times over a 32 hour period, and this interrogation involved more than just questioning: Petitioner Cooper confessed to his role in a murder only after receiving promises that his father, being held on a separate charge, would be released,

and his brother not prosecuted for a parole violation, if he would confess, *Stein* v. *New York*, 346 US at 167; Petitioner Stein, being held in the basement of a police barracks, confessed only after being informed that Cooper's statement implicated him in the murder, and being told to "sleep on it." *Id.*, at 168. This Court held that both petitioners' confessions were voluntary and not the product of police coercion, but did state: "Of course, a process of interrogation can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish extortion of an involuntary confession." *Id.*, at 184.

This Court then proceeded to discuss the importance of interrogation in the following language at 184:

> Interrogation does not have social value in solving crime, as physical force does not. By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime. The duty to disclose knowledge of crime rests with all citizens . . . This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive.

The People respectfully submit that a review of the manner in which police took a statement from defendant Pepper yields only one possible conclusion: namely, that New York State Police took every precaution possible to safeguard the defendant's rights. Yet, the Court of Appeals by its affirmance of the Appellate Division herein has ordered evidence of this confession suppressed. Under these circumstances, the exclusion of evidence will in no way deter these investigators from behaving in the same way again under similar circumstances. Thus, the Court of Appeals decision herein can only deter them from acting at all, from conducting investigations into felony complaints. Such a result is without question undesirable and directly contravenes the "good-fath" exception to the

exclusionary rule. This result also directly contravenes this Court's decision in *Stone* v. *Powell*, 428 US 465 (1976); *United States* v. *Janis*, 428 US 433 (1976); and *Michigan* v. *Tucker*, 417 US 433 (1974), and should be declared unconstitutional.

In addition, because *People* v. *Pepper* held that *People* v. *Samuels* should be applied retroactively, many cases where police believed they had sufficient evidence to convict will be subject to reversal.[1] Because police curtail an investigation after a confession has been obtained many investigations could not realistically be reopened since evidence or witnesses will no longer be available.

It is necessary that criminal investigations take place as soon as possible after the commission of a crime. Physical evidence such as fingerprints, tire marks, footprints and blood and many other items are gone forever and often within days after a crime has been committed. Items of physical evidence such as automobiles, writings, and weapons, including guns and knives, often are unavailable when a crime is reinvestigated.

As to reinvestigations this Court stated in *Stovall* v. *Denno*, 388 US 293, 300: "Inquiry would be handicapped by the unavailability of witnesses and dim memories." *Williams* v. *United States*, 401 US 646, 654, as to retrials, refers to the "inevitable risk of unavailable witnesses and faulty memories" and, as to reinvestigation, states: "Authorities might have been foreclosed from obtaining other evidence they might have secured had they known the evidence they were using was constitutionally suspect." Unfortunately, witnesses forget many items which may seem insignificant to the witnesses but often

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[1] A review of Albany County District Attorney's felony files opened between January 1, 1979 & July 1, 1979 show that out of the 827 files then opened, 368 involve written or oral statements of defendants. Moreover, as the severity of the crimes increased, so did the percentage of statements.

are very important to the police agencies. Also, witnesses who are interviewed long after a crime tend to give confusing and misleading information due to forgetfulness and also from reading news articles or hearing reports on radio or television which may be inaccurate or misleading. Witnesses often change their addresses, especially in crimes committed in inner cities, and sometimes it is almost impossible to find a witness even a few weeks after a crime has been committed. This is particularly so with regard to transients; often persons present when crimes occur are those who move about. In *Jenkins* v. *Delaware*, 395 US 213, 220, this Court, citing the New York State Court of Appeals case of *People* v. *Sayers*, 22 NY2d 571, recites some of the problems of retrials and dilatory investigations where prosecutors are unable to use "incriminating statements obtained and admitted into evidence pursuant to practices not previously proscribed." At page 576 of *Sayers*, the New York State Court of Appeals states:

> "The law enforcement officials in possession of confessions obtained in accordance with the law as it was at the date of the confession will be unable at this late date to obtain evidence independent of the confession and these defendants and other confessed criminals in the same position will go free."

Another of the real problems in a late investigation is identification of a criminal defendant. If under *People* v. *Pepper* police have to reinvestigate, eyewitnesses may have difficulty identifying a defendant, not only because their memories may be impaired, but also because the appearance of people changes: men grow beards or lose them; moustaches may come and go, as do tans. In sum, practically every indication of physical identity can change over time.

The use of defendant Pepper's statement which amounts to a confession herein is more crucial than the usual statement, because under New York State Penal Law Section 130.16, here

the complaining witness, since she was eleven years of age when sodomized, must have her testimony corroborated.[2]

Finally, and most importantly perhaps, because *People* v. *Samuels* is applied retroactively, many persons who admitted committing crimes, like defendant Pepper, will be free without punishment to commit further crimes. This result is most likely to occur in murder cases, where quite often the defendant's statement is the only non-circumstantial evidence against him. New York State cases recognize this. In *People* v. *Kaiser*, 21 NY2d 86 the New York State Court of Appeals stated: "Do we not, however, sanction criminal conduct and promote disrespect for law when we allow a man who is clearly guilty, who is convicted on the basis of evidence obtained in conformity with the strictest standards of the Constitution, to go free and menace the security of law-abiding citizens?" As stated by Judge Keating of the New York State Court of Appeals, in his concurring opinion in *People* v. *McQueen*, 18 NY2d 337 at page 352:

> "What is significant is that many of those defendants convicted of heinous crimes would be set free to walk the streets because their confessions would be excluded, although there was not a question at all about their guilt

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[2] Penal Law Sec. 130.16 titled *Sex offenses;* corroboration provides:

"A person shall not be convicted of consensual sodomy, or an attempt to commit the same, or of any offense defined in this article of which lack of consent is an element but results solely from incapacity to consent because of the alleged victim's age, mental defect, or mental incapacity, or an attempt to commit the same, solely on the testimony of the alleged victim, unsupported by other evidence tending to:

(a) Establish that an attempt was made to engage the alleged victim in sexual intercourse, deviate sexual intercourse, or sexual contact, as the case may be, at the time of the alleged occurrence; and

(b) Connect the defendant with the commission of the offense or attempted offense.

> or about the *veracity* and reliability of their confessions. No good reason has been suggested for reaching such an anomalous result and, as I see it, every significant policy consideration leads to the opposite conclusion."

POINT I

PEOPLE v. PEPPER CONTRAVENES THE SIXTH AMENDMENT AS INTERPRETED BY THIS COURT IN FARETTA v. CALIFORNIA AND RELIANCE BY POLICE THEREON AND MUST BE HELD UNCONSTITUTIONAL.

In *Faretta* v. *California*, 422 US 806 (1975), this Court held that a State may not constitutionally hale a person into its criminal courts and force a lawyer upon him against his will. In so doing, this Court held at 819-20 that there was a Sixth Amendment right to self-representation:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation--to make one's own defense personally--is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails . . . The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant--not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

In order for a defendant to avail himself of his right to self-representation, he must, as this Court stated in *Faretta*, 422 US at 835, "knowingly and intelligently" waive his right to counsel. This Court proceeded to emphasize at 834 that:

> It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect which is the lifeblood of the law.' (*quoting Illinois* v. *Allen*, 397 US 337, 350-51, (Brennan J., Concurring).

This Court underlined further at 834 n. 46: "[W]hatever else may or may not be open to his appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.' "[3]

The People respectfully submit that *People* v. *Pepper* directly contravenes the Sixth Amendment as construed in *Faretta* because it compels a defendant arrested with a warrant to have an attorney present before he may make a voluntary statement to police. For this reason, *People* v. *Pepper* must be declared unconstitutional.

The State Police in *Pepper* relied on this Court's pronouncement in *Faretta* that defendants have a constitutional right to represent themselves. Defendant Pepper chose not to have an attorney after having been given his *Miranda* rights. Nothing in *Faretta* requires that a defendant can surrender his right to counsel only in the presence of an attorney. Yet, this is what the Court of Appeals so required in *Pepper*.

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[3] The Second Circuit in *U.S.* v. *Mohabir*, 624 F2d 1140, 1153 as "to 'outlawing' all statements following uncounseled waivers by indicted defendants" stated that this "might run counter to the policy that a defendant constitutionally can insist upon proceeding without counsel even though he has been fully advised of the folly of doing so. *See Faretta* v. *California*, *supra*, 422 U.S. at 835-36, 95 S.Ct. at 2541."

The defendant has the right and the police have the duty to fulfill the complete implementation of the Sixth Amendment. Police had the right to assume defendant Pepper could waive counsel and proceed without counsel under *Faretta* and *Miranda* v. *Arizona*, 384 US 436. The State Police would have violated defendant Pepper's federal constitutional right to proceed without counsel had they refused defendant's voluntary decision to proceed without counsel. Police were only fulfilling their federal constitutional duty herein.

Since this Court has stated that a defendant had the constitutional right to represent himself, could not police relying on *Faretta* recognize defendant Pepper's right to self-representation. Defendant Pepper said he did not want a lawyer when he was advised by the State Police of his right to counsel under *Miranda*. He voluntarily relinquished this right as found by Judge Clyne. Even the Appellate Division in reversing on the law stated that "the defendant agreed to meet the officers at their barracks to give a statement and went there voluntarily, driving his own car and not in the company of the officers."

Nothing in *Faretta* requires a defendant to surrender his constitutional right to counsel in the presence of a lawyer. Under the Supremacy Clause in the United States Constitution, the right to counsel under the Sixth Amendment, as construed in *Faretta*, certainly must be recognized as the exclusive right to counsel when his state right to counsel conflicts as it does with *People* v. *Samuels*. The New York requirement that defendant can only waive his right to counsel in the presence of an attorney before making an out-of-court statement conflicts with *Faretta*. The New York requirement interferes with the right of a defendant to represent himself which the Police relied upon. As stated in *Gannett Co.* v. *DePasquale*, 443 US 368, at page 382 in footnote 10 the Sixth Amendment contemplates "a norm in which the accused, and not a lawyer, is master of his own defense."

POINT II

PEOPLE v. PEPPER VIOLATES THE NINTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE RIGHT OF THE PUBLIC THEREUNDER TO PERSONAL SAFETY AND SHOULD BE HELD UNCONSTITUTIONAL.

The Ninth Amendment of the United States Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People." The purpose of this Amendment is to guarantee to the People those rights inherent to citizenship in a Democracy which are not specifically enumerated in the Bill of Rights. *Griswold* v. *Connecticut*, 381 US 479, 488-89, 490-91 (1965) (Goldberg, J., Concurring). *United States* v. *Cook*, 311 F. Supp. 618 (D.C. Pa., 1970). It is respectfully submitted that this Amendment is broad enough in scope to encompass a right to personal safety on behalf of the People of the State of New York.

Justice Goldberg, with whom Justice Brennan and the then Chief Justice Warren joined, discussed the Ninth Amendment at length in his concurring opinion in *Griswold* v. *Connecticut*, 381 US 479 (1965). Justice Goldberg first emphasized at 488-89:

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments . . . .
>
> [The Amendment] was proferred to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

Continuing, Justice Goldberg explained at 490-91:

> While this Court has had little occasion to interpret the Ninth Amendment, '[i]t cannot be presumed that any clause in the constitution is intended to be without effect.' *Marbury* v. *Madison*, 1 Cranch 137, 174, 2 L Ed 60, 72. In interpreting the Constitution, 'real effect should be given to all the words it uses.' *Myers* v. *United States*, 272 US 52, 151, 71 L Ed 160, 180, 47 S Ct 21. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment . . . .

Justice Goldberg added at 493-94:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditional and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 US 97, . . . The inquiry is whether a right involved is "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' . . ." *Powell* v. *Alabama*, 287 US 45 . . . "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe* v. *Ullman*, 367 US 497 . . . (dissenting opinion of Mr. Justice Douglas).

Relying in part upon this discussion of the importance of the Ninth Amendment by Justice Goldberg, a majority of this Court in *Roe* v. *Wade*, 410 US 113, 153 stated: "This right of privacy, whether it be founded in the Fourteenth Amendments concept of personal liberty and restrictions upon state action,

as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether to determine her pregnancy." This recognizes that people, and not only states, have rights under the Ninth Amendment.

As stated in 9 NY Jur. Constitutional Law Section 225: "It has been said that, of all rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security." This right, whether emanating directly from the Ninth Amendment or perhaps even pre-existing the United States Constitution and New York State Constitution, is certainly broad enough to cover the right of the public to be protected from criminals who freely and voluntarily admit to police the commission of a felony. Defendant Pepper, for example, freely admitted his guilt three separate times: to the police, at the Suppression Hearing, and again when he pled guilty. Allowing criminals to go free after such a series of admissions endangers the law abiding members of society and removes any possible deterrent that punishment for crimes may have. This not only endangers public safety and makes a mockery of justice, but it also absolutely frustrates police in their attempt to fulfill their investigatory duties.

The People respectfully offer that because *People* v. *Pepper* contravenes the Ninth Amendment right of public safety for the citizens of New York State and must be declared unconstitutional.

People v. *Samuels*, 49 NY 2d 218 was decided January 15, 1980, almost seven (7) months after Mr. Pepper pled guilty on June 22, 1979. Because of this, there was nothing in the record to show the terrible impact upon the people of New York State if *People* v. *Samuels* were applied retroactively thereby releasing self-admitted criminals. On oral argument, George H. Barber, Assistant District Attorney, requested the Appellate Division to send the case back in order that the People could introduce evidence showing the impact if *People* v. *Samuels* were applied

retroactively. The Appellate Division did not grant this request, and it was again stated to the Court of Appeals on oral argument by Mr. Barber.

Even though there is no evidence thereof in the record, it seems obvious that if self-admitted murderers, rapists and other felons, who have committed violent crimes, are not punished, or are released from prison without in any way completing their sentence, many thereafter will commit the same crimes again.

CONCLUSION

FOR THE FOREGOING REASONS THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

SOL GREENBERG
DISTRICT ATTORNEY OF
ALBANY COUNTY
Albany County Court House
Albany, New York 12207
(518) 445-7555

GEORGE H. BARBER,
Of Counsel
Assistant District Attorney
Albany County Court House
Albany, New York 12207

APPENDIX

NEW YORK COURT OF APPEALS OPINION, People v. Pepper.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v THEODORE PEPPER, Respondent.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v WAYNE CLAUDE UTTER, Respondent.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v GUMERSINDO TORRES, Also Known as JOSE TORRES, Appellant.

decided June 16, 1981

OPINION OF THE COURT

FUCHSBERG, J.

Crucial to these three appeals, each emanating from a conviction of a felony unrelated to the others, is a common question. It calls upon us to determine what retrospective effect, if any, is to be accorded our decision in *People* v *Samuels* (49 NY2d 218), where in essence we held that once an accusatory instrument has been filed a defendant cannot waive his constitutional right to counsel save in the presence of counsel.

The *Samuels* rationale rested on a fundamental and uncomplicated principle, that once an accusatory instrument is filed, viewed realistically, the defendant is no longer a suspect but an accused, and the People's role may then be said to have shifted from the more neutral theatre of investigation to the far more aggressive one of prosecution. In this posture, unless our adversary system of criminal justice is to flounder on the happenstance of whether, for example, a particular defendant is ignorant or sophisticated, "any discussions relating thereto should be conducted by counsel [for] at that point the parties are in no position to safeguard their rights" (*People* v *Settles*,

46 NY2d 154, 164 [criminal proceeding initiated by indictment]).

The relevancy of the retroactivity of this holding to the cases at hand appear in the following contexts:

In People v Pepper and People v Utter, statements were elicited from the defendants after felony complaints had been filed and arrest warrants had issued. In Pepper, the executing officers took the defendant to the police barracks; in Utter, it was to a police substation. At each location, it is established that, though the custodial warnings commanded by *Miranda* v *Arizona* (384 US 436) were given, the defendant voluntarily submitted to the uncounseled interrogation. In both cases, the implicated questioning occurred well before we decided *Samuels*. When the defendant in each case moved, *inter alia*, to suppress his statement, the respective County Courts heard and denied the motions. However, on each defendant's appeal from his ultimate judgment of conviction, the Appellate Division, now acting post-*Samuels*, reversed the judgment, granted the motion to suppress and remanded the case to the County Court for further proceedings. The People now appeal from the orders of reversal, each by leave of a Judge of this court (CPL 460.20).

In People v Torres, two statements, one an oral confession made to a police detective and the other a stenographically recorded statement made to an Assistant District Attorney, were obtained from the defendant under circumstances sufficiently similar for the People to concede that *Samuels* is factually apposite. But, for present purposes, this case is distinguished from Pepper and Utter in the important respect that, after the trial court, here the Supreme Court sitting in Kings County, had denied suppression, the Appellate Division, before whom the appeal arrived before rather than after we ruled in *Samuels*,

affirmed. To be precise, though sentence had been pronounced on Torres on March 3, 1976 and the Appellate Division affirmed his conviction on June 26, 1978, it was not until more than a year and a half later, January 15, 1980, that we decided *Samuels*. Long before then, on August 15, 1978, a Judge of this court had denied Torres' application for leave to appeal (45 NY2d 831). The ultimate grant that presently brings up the defendant's appeal was on an application for reconsideration presented post-*Samuels* (50 NY2d 1064).[1]

The position of each party on the pivotal prospective versus retrospective issue is pointed. In all three cases, emphasizing, among a miscellany of considerations, that "*Samuels* established wholly new law in New York", that it does not relate to the integrity of the fact-finding process, that law enforcement authorities have placed justifiable reliance on the "pre-*Samuels*" rule and that the impact of retrospective application on the administration of justice would be both adverse and "monumental", the People ask that it be applied prospectively only to those cases tried after *Samuels*. However, against the contingency that we find *Samuels* applicable to cases still in the appellate process at the time we announced that decision, they urge, in the alternative, that in Torres' case we treat the date when his initial application for leave to appeal to this court was denied as the end of his appellate road. As to the defendants, not surprisingly, Torres insists that his case is still not finally determined, and all three seek full retroactivity. For the reasons which follow, we believe the Appellate Division's decision

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1. As required by *People* v *Welcome* (37 NY2d 811), the application for reconsideration was made to the Judge who initially denied leave to appeal. (See, also, 22 NYCRR 500.8 [b].)

was correct in two of the cases and we do not reach the third because it was no longer in the appellate process.

None of the arguments submitted to aid us in fixing the most appropriate date for putting the overruling in question into effect is new. All have figured in the extensive attention the subject has received from jurists and commentators who in the last half century have searched for ways in which principled mitigation of the hardships that at times may accompany abrupt changes in decisional law can be achieved (see Overruling Decision—Application, Ann., 10 ALR3d 1371; Fairchild, Limitation of New Judge-Made Law to Prospective Effect Only, 51 Marq L Rev 254; Cardozo, Address Before the New York State Bar Association, 1932 NYSBA Report 263, 296-298).

As a result, over the years, in some instances the historic common-law rule, that all cases on direct appeal must be decided in accordance with any newly declared but conceptually always existent principle, has been tempered where there was significant reliance on a now overruled and, therefore, in theory, erroneously stated precedent (see *People* v *Morales*, 37 NY2d 262, 267-268, and authorities cited thereat; Snyder, Retroactive Operation of Overruling Decisions, 35 Ill L Rev 121; Schaefer, Control of "Sunbursts": Techniques of Prospective Overruling, 42 NYU L Rev 631). However, notwithstanding such departures and the underlying tensions they display, overall much of the vitality of the traditional rule has survived the debate. This steadfastness is consonant with the fact that in any event most decisional law acts on past events. The retroactivity principle is also symbolic of the credo that our government is one of laws and not of men, a concept which depends heavily on a sense of continuity. (See *Montague* v *Vinzant*, 643 F2d 657, 659-660; Mishkin, The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv L Rev 56, 62-67.)

The conflict between these opposing forces has not left the area of criminal procedure untouched. In a series of opinions, both this court and the United States Supreme Court have addressed the subject, both in cases pending on direct appeal and, if the appellate process has been exhausted, where relief is sought on collateral proceedings (see, e.g., *United States* v *Peltier*, 422 US 531; *People* v *Morales*, 37 NY2d 262, 268-269, *supra*, and cases cited thereat).

This is not to say that definitive standards have evolved. But neither is the field untracked. As we noted in *Morales* (37 NY2d 262, 269, *supra*), useful, if general, guidelines, are available. In judging whether it is more appropriate to adhere to rather than deviate from the common-law convention, be it to grant full retroactive application (permitting a collateral attack on a conviction no longer in normal appellate channels) or to limit relief to prospective police conduct or trials, in *Desist* v *United States* (394 US 244, 249), the Supreme Court stressed, and in *Morales* we had occasion to weigh, three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards". In this formulation, the extent of the reliance and the nature of the burden on the administration of justice are of substantial significance only when the answer to the retroactivity question is not to be found in the purpose of the new rule itself (*Desist* v *United States*, *supra*, p 249).

Thus, where otherwise there could be a complete miscarriage of justice, current constitutional standards that go to the heart of a reliable determination of guilt or innocence have been substituted for those in effect at the time of trial (*Stovall* v *Denno*, 388 US 293, 297 [right to counsel decisions "at stages

of the prosecution where denial of the right almost invariably deny a fair trial"]; *Holloway* v *McElroy*, 632 F2d 605 [appellate review of sufficiency of evidence]). So too, at the other end of the spectrum, decisions which are only collateral to or relatively far removed from the fact-finding process at trial have been applied prospectively (e.g., *United States* v *Peltier*, 422 US 531, *supra* [exclusionary rule in search and seizure cases, the intended deterrent effect of the ruling having no necessary relationship to the reliability of the admitted proof]).

In contrast to the extremes described in these Federal cases, as our own decisions have made clear, a defendant's right to counsel in pretrial encounters falls within a middle ground. So, while we have found retroactivity in order in such cases, its application has been limited to those still on direct review at the time the change in law occurred (e.g., *People* v *Albro*, 52 NY2d 619, 624; *People* v *Bell*, 50 NY2d 869; *People* v *Singer*, 44 NY2d 241, 251; *People* v *Macedonio*, 42 NY2d 944). In counterpoint, we have denied retroactive application where that process has been exhausted (*People* v *Wooden*, 46 NY2d 938; *People* v *Robles*, 42 NY2d 1051; *People* v *Rivera*, 16 NY2d 879).

We see no reason to depart from that course here. While we cannot say that uncounseled station house interrogations necessarily go to the ultimate issue of guilt or innocence, they are not insignificant events. Aside from the avoidance of incriminating statements, the benefits of introduction of counsel at that stage, with its concomitant advantages of early advice and investigation, are not to be ignored.

In addition, in balancing the importance of the right *Samuels* guarantees against its effect on other pending cases, we cannot lose sight of the fact that the relatively early terminal point of retroactivity limited to cases young enough to still be on direct

appeal militates against the likelihood of prejudicial mildewing of witnesses' memories.

The People's reliance argument is even less impressive. For one thing, our decision need not have taken the People by surprise. Given the broad philosophical language of *People* v *Hobson* (39 NY2d 479, 484), which, in turn, had been more than foreshadowed by *People* v *Arthur* (22 NY2d 325) and the still earlier cases cited therein, it was hardly unanticipated. Indeed, since, as Justice JACKSON put it realistically, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances" (*Watts* v *Indiana*, 338 US 49, 59), it is difficult to perceive how they could have ended up in a different position from the one in which suppression leaves them, i.e., without the statement.

Appellant Torres, however, is not entitled to benefit from the change in law. The normal appellate process came to an end for him upon the original unconditional denial of his application for leave to appeal to this court (*People* v *Muller*, 11 NY2d 154, 156, cert den 371 US 850).[2] Thereafter, only complete retroactivity could make *Samuels* applicable. And that, impermissibly, would mean that every defendant to whose case it was relevant, no matter how remote in time and merit, would become its beneficiary. Absent "manifest injustice", no exception was available to Torres (*People* v *Robles*, 42 NY2d 1051, *supra*).

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2. We note that, while a Judge of this court has discretion to reconsider a prior denial of an application for leave to appeal, that discretion is exercised rarely (see *People* v *Welcome*, 37 NY2d 811, *supra*). All the more is this so in light of the availability of a proceeding to vacate a judgment pursuant to CPL article 440 in circumstances in which a decisional law must be given complete retroactivity (see *People* v *Pohl*, 23 NY2d 290).

Accordingly, each of the orders appealed from should be affirmed.

GABRIELLI, J. (concurring). I concur in the results reached by the majority in these appeals, but would base my conclusion on somewhat narrower grounds.

The question presented by these appeals is whether the rule enunciated in *People* v *Samuels* (49 NY2d 218) should be applied retroactively to cases on appeal at the time the decision was announced. In *Samuels*, we held that the "indelible" right to counsel attaches upon the filing of a felony complaint. Once a felony complaint is filed, the criminal action is formally commenced and the accused cannot thereafter validly waive his constitutional rights in the absence of counsel.

Our holding in *Samuels* was based upon *People* v *Hobson* (39 NY2d 479), which was routinely applied to cases that were in the appellate process at the time that decision was handed down (see, e.g., *People* v *Macedonio*, 42 NY2d 944). Indeed, each time there has been a new development in the line of cases based upon *Hobson*, the new rule has been applied in a similar retroactive manner (see, e.g., *People* v *Albro*, 52 NY2d 619; and *People* v *Bell*, 50 NY2d 869 [applying *People* v *Rogers* (48 NY2d 167) retroactively]; *People* v *Lucas*, 53 NY2d 678; *People* v *Prince*, 50 NY2d 883 [applying *People* v *Cunningham* (49 NY2d 203) retroactively]). There is simply no logical justification for treating the *Samuels* rule differently.*

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* Indeed, we have already applied the holding in *Samuels* to cases which arose before that decision was announced (*People* v *Lucas*, 53 NY2d 678; *People* v *Cullen*, 50 NY2d 168, 174). In my view, these cases alone are sufficient to dispose of the issues presented in the Pepper and Utter appeals.

In fact, the arguments in favor of according *Samuels* retroactive effect are particularly compelling, since the holding in that case was foreshadowed and even perhaps mandated by prior case law. In *People* v *Settles* (46 NY2d 154) we held that once an indictment is filed the "indelible" right to counsel attaches and the accused can no longer effect a valid waiver of his rights unless his attorney is present (see *People* v *Hobson, supra* [overruling *People* v *Lopez* (28 NY2d 23, cert den 404 US 840)]; 51 St John's L Rev 216, 220-222; see, also, *People* v *Blake*, 35 NY2d 331). Although *Settles* involved an indicted defendant, the holding in that case was predicated upon the broader notion that a suspect is entitled to the full panoply of protections inherent in the State constitutional right to counsel when "the character of the police function shifts from investigative to accustory" (46 NY2d, at p 163). *Settles* thus made it perfectly clear that the formal commencement of a criminal action is sufficient to trigger the *Hobson* right to counsel. From *Settles* it required but a simple mechanical application of logic to conclude that the right to counsel would also attach upon the filing of a felony complaint, which, like the filing of an indictment, represents the formal commencement of a criminal action (CPL 1.20, subds 1, 8, 17). Hence, far from representing an unexpected departure from precedent, *Samuels* was actually no more than a predictable elaboration of a well-settled and widely understood principle of law.

In light of the history of the *Samuels* rule, it is evident that the decisions of the Appellate Division in the Pepper and Utter cases should be affirmed. In each case, the Appellate Division, relying upon *Samuels*, reversed the conviction and ordered the inculpatory statement in question suppressed. Since the rights of both defendants were indisputably violated under our holding in *Samuels* and since *Samuels* is clearly applicable to cases such as these, which were in the appellate process at the time

that decision was announced, there is no legal basis for upsetting the rulings made below.

A different analysis must be applied, however, in the case of defendant Torres, whose application for leave to appeal to this court was denied some 17 months before *Samuels* was handed down. Unlike defendants Pepper and Utter, the defendant in the Torres case had already exhausted his appellate remedies by the time *Samuels* was decided (see *People* v *Muller*, 11 NY2d 154, cert den 371 US 850), and, as our prior decisions indicate, he is therefore not entitled to have his conviction reopened on the basis of the *Samuels* rule (see *People* v *Wooden*, 46 NY2d 938; *People* v *Robles*, 42 NY2d 1051).

Judges JONES, WACHTLER and MEYER concur with Judge FUCHSBERG; Judge GABRIELLI concurs in a separate opinion in which Chief Judge COOKE and Judge JASEN concur.

In each case: Order affirmed.

NEW YORK APPELLATE DIVISION OF SUPREME COURT OPINION, People v. Pepper.

(June 26, 1980)

MEMORANDA, Third Dept., June, 1980

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v THEODORE PEPPER, Appellant.—Appeal from a judgment of the County Court of Albany County, rendered July 12, 1979, convicting defendant upon his plea of guilty of the crime of sodomy in the second degree. On November 16, 1978, at about 8:00 P.M., one of the arresting officers filed a felony complaint against the defendant, charging him with sodomy in the second degree and sexual abuse in the second degree. On the basis of such complaint the Town Justice of the Town of Guilderland issued an arrest warrant. No effort was made by the arresting officer to execute such warrant until the following day, when, in the company of another investigator, the officer who had obtained the warrant went to the defendant's place of business and questioned the defendant about his knowledge or involvement in the incident being investigated. The warrant was not executed, nor was the defendant told of its existence, nor was he placed under arrest. Rather, the defendant agreed to meet the officers at their barracks to give a statement and went there voluntarily, driving his own car and not in the company of the officers. The defendant arrived at the barracks about 10:30 A.M. on November 17, 1978, where a lengthy interrogation occurred which culminated in a statement being signed by the defendant about 2:00 P.M. A factual dispute exists as to whether the defendant was told of his arrest at the time of his arrival at the barracks. In any event, after his statement was obtained he was then told that he was under arrest. During his interrogation he was admittedly treated well and after his statement was permitted to call his attorney. The defendant was fingerprinted, photographed and placed in a lineup which concluded at about

3:00 P.M. Thereafter, the defendant was arraigned in the Guilderland Town Court at about 4:15 P.M., some 20 hours after the arresting officer had obtained the arrest warrant based on his filing of the felony complaint. After a suppression hearing, and on June 21, 1979, the County Court found that the defendant's statement was voluntary, that the defendant had been fully informed of his *Miranda* rights and had waived the same, and that the statement was given without compulsion or duress, and refused to suppress it. Thereupon, the defendant pleaded guilty to the crime of sodomy in the second degree in satisfaction of the indictment. On July 12, 1979, he was sentenced to an indeterminate term of imprisonment having a maximum term of seven years. Under present law as determined by the Court of Appeals in *People* v *Samuels* (49 NY2d 218), a statement obtained in the absence of counsel after the filing of a felony complaint must be suppressed. The filing of the felony complaint herein and the issuance of the warrant based thereon formally commenced the criminal proceeding against the defendant and placed him "in no position to safeguard his rights" and entitled him as of right to the assistance of counsel (*People* v *Holcombe*, 74 AD2d 700), and such right having so attached cannot be waived by the defendant except in the physical presence of counsel (*People* v *Arthur*, 22 NY2d 325; see *People* v *Dean*, 47 NY2d 967; *People* v *Ermo*, 47 NY2d 863; *People* v *Holcombe*, *supra*). Although the decision of the Court of Appeals in *People* v *Samuels* (*supra*) was subsequent to the defendant's conviction herein, nevertheless we hold that such decision, involving as it does the constitutional right to counsel, must be given retroactive effect (*People* v *Morales*, 37 NY2d 262; *People* v *Albro*, 73 AD2d 73). Having so determined, we need not reach the other issues presented. Moreover, this issue may be raised for the first time on appeal (*People* v *Cullen*, 50 NY 2d 168). Judgment reversed, on the law, guilty plea vacated,

and matter remitted to the County Court of Albany County for further proceedings not inconsistent herewith. Mahoney, P.J., Sweeney, Kane, Main and Casey, JJ., concur.

NEW YORK COUNTY COURT OPINION BY HON. JOHN J. CLYNE.

STATE OF NEW YORK
COUNTY COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

— against —

THEODORE PEPPER,

Defendant.

APPEARANCES:

For the People:
HON. SOL GREENBERG
District Attorney
County Court House
Albany, New York 12207
OF COUNSEL:
DIANE L. DUBIAC
Assistant District Attorney

For the Defendant:
McDERMOTT & CHEESEMAN, ESQS.
112 State Street
Albany, New York 12207
PAUL E. CHEESEMAN, ESQ.

CLYNE, J. This is a motion by the defendant to suppress certain identification testimony, tangible property, and certain statements made by the defendant to law enforcement officials.

Between November 8, 1978 and November 16, 1978 Investigator Thomas Martin of the New York State Police commenced an investigation concerning a young female named Kathleen Valenti and on November 16, 1978 at approximately 8:00 P.M. he obtained a warrant for the arrest of the defendant charging the crimes of sexual abuse in the second degree and sodomy in the second degree. The basis for the warrant was the sworn statement of Kathleen Valenti. On November 17, 1978 at approximately 10:00 A.M. Investigator Martin, accompanied by

Investigator Connolly of the New York State Police, went to the automobile dealership of the defendant located on Route 9 in the Town of Colonie. The officers went to defendant's office, introduced themselves, and indicated that they were there to discuss a matter concerning Mary Angus and Kathleen Valenti. At that point Investigator Martin was ninety per cent sure that he had the right man. Investigator Connolly gave the defendant his Miranda warnings and the defendant made certain oral statements sought to be suppressed. Also, during this initial interview the defendant freely and voluntarily turned over to the officers certain uncashed checks. The discussion with the defendant in his office lasted approximately fifteen minutes, after which the defendant agreed to meet the officers at Troop G in Loudonville. At no time was the defendant advised that the officers had obtained a warrant for his arrest and at no time was he placed under arrest by the officers while at his place of business.

The officers returned to Troop G and shortly thereafter the defendant arrived by himself. He was taken to an office on the second floor at approximately 10:30 A.M. He was again given his Miranda warnings by Investigator Connolly, at which time Investigator Martin exhibited his Miranda card to the defendant. Investigator Connolly continued his interview with the defendant during which the defendant made certain oral statements which are sought to be suppressed and by approximately 1:30 P.M. that day the oral statements were reduced to a written statement. Investigator Martin left the room after approximately fifteen minutes of the interview and Investigator Connolly and the defendant were alone during the period preceding the execution of the written statement. Also, during that period the defendant was permitted to have coffee, use the bathroom, and to have free access to a telephone. However, the defendant had been told that he was under arrest upon his arrival at Troop G that morning.

During the interview the defendant called his place of business and at approximately 2:15 P.M. he called his attorney, Mr. Turchick. At no time did the defendant ever advise the law enforcement officials that he desired to be represented by an attorney. When Mr. Turchick returned the defendant's phone call he spoke directly with the defendant who informed him that he had been arrested and that he was going to be taken out of the Guilderland Justice Court within a short period of time. Mr. Turchick then made arrangements to meet the defendant at the arraignment in Justice Court. A line-up was held at about 2:30 P.M. without any indication that the defendant was represented by counsel or desired counsel from either the defendant or his counsel. The line-up consisted of seven white males of similar age and appearance. Suffice to say the victim picked the defendant out of the line-up.

At the hearing the defendant testified on his own behalf. He indicated that he was forty-three years of age, had no prior criminal history, that he owned a major automobile dealership in this County employing some forty people and that he had attended four years of college. He also testified, in substance, that he signed a statement without really knowing what he was signing although he signed at least two such statements on both the first and second pages thereof. He testified that he did not receive his Miranda warnings and contradicted the police officers in other areas of their testimony. This Court finds that the testimony of the defendant is not worthy of belief.

The foregoing constitutes findings of fact.

The defendant argues that the statements made to the law enforcement officials and the line-up should be suppressed for the reason that such were obtained and/or conducted subsequent to the filing of the accusatory instrument in the Justice Court and therefore the right to counsel at that juncture could

not be waived, citing *People* v. *Blake*, 35 NY2d 331. The *Blake* case, supra, involved a post-arrest pre-arraignment situation. The Court stated that upon the filing of an accusatory instrument, whether or not a lawyer has been retained or assigned for general purposes, there may not be, except in exigent circumstances, a corporeal viewing of the defendant for identification purposes in the absence of counsel. In the present case the defendant was arrested at approximately 10:30 A.M. at the State Police Barracks in Loudonville. The corporeal viewing took place at approximately 2:30 P.M. prior to arraignment in the Justice Court. This case involves the sexual abuse of a female child less than fourteen years of age. Concededly, at the time of the viewing the police were in possession of a written confession from the defendant. Nevertheless, in view of the tender age of the child and the nature of the crime, it would appear that prudent police work and basic fairness to both the defendant and the victim constitute exigent circumstances in the particular setting of this case which would permit a waiver of the right to counsel at that juncture and such a viewing, in the judgment of this Court, falls within the light of the pragmatic exceptions noted in the *Blake* case.

A more serious question involves the statements obtained from the defendant following his arrest after the filing of the accusatory instrument in the Justice Court on the evening of November 16, 1978 and prior to the arraignment. The Court of Appeals in *People* v. *Settles*, 46 NY2d 154 sets forth in detail the history and the law concerning the right of a criminal defendant to counsel in this state. *Settles*, supra, makes it clear that the right to counsel can not be waived following indictment. In this case the defendant had not been indicted when the incriminating statements were obtained. However, the accusatory instrument had been filed in the Justice Court to form the basis for a warrant charging the defendant with the crimes of sodomy in the second degree and sexual abuse in the

second degree. The defendant had been arrested but not arraigned. It was within three hours of the arrest that the statements were obtained and several hours prior to arraignment. Could the defendant waive the right to counsel during that period? This Court, relying upon *People* v. *Stockford*, 24 NY2d 146; *People* v. *Torres*, 63 AD2d 1033, leave to appeal denied; *People* v. *Babcock*, 91 Misc 2d 921, aff'd 64 AD2d 769; concludes that defendant could and did waive his right to counsel and further that the statements were freely and voluntarily given after having received the Miranda warnings and consequently will not be suppressed. The tangible property seized was freely and voluntarily given to the police by the defendant and will not be suppressed. The line-up was eminently fair and for the reasons stated above will not be suppressed.

This constitutes the decision and order of this Court.

Dated: Albany, New York
June 21, 1979

s/ JOHN J. CLYNE
John J. Clyne
Albany County Judge

GRAND JURY INDICTMENT.

File No. ~~S781360~~
S781362

COUNTY
———— COURT – COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

– against –

MARY ANGUS and
THEODORE PEPPER

Defendant.

November 22, 19 78
SEPTEMBER
TERM

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendants of the following crime :

FIRST COUNT: Sodomy in the Second Degree, in violation of Section 130.45 of the Penal Law of the State of New York, a Class D Felony, in that the defendants, sometime during the months of June through September, 1977, in the parking lot of the A & P on Johnson Road, in the Town of Colonie, County of Albany, State of New York, did being eighteen years old or more, engage in deviate sexual intercourse with another person less than fourteen years old, to wit: at the aforesaid date, time and place, the defendant, Theodore Pepper being aided by the defendant, Mary Angus, engaged in deviate sexual intercourse consisting of placing his penis in the mouth of one Kathleen Valenti, a person less than fourteen years of age.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendants of the following crime:

SECOND COUNT: Sodomy in the Second Degree, in violation of Section 130.45 of the Penal Law of the State of New York, a Class D Felony, in that the defendants, sometime during the months of June through September, 1977, in a parking lot in

the County of Albany, State of New York, did being eighteen years old or more, engage in deviate sexual intercourse with another person less than fourteen years old, to wit: at the aforesaid date, time and place, the defendant, Theodore Pepper being aided by the defendant, Mary Angus, engaged in deviate sexual intercourse consisting of placing his penis in the mouth of one Kathleen Valenti, a person less than fourteen years of age.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendants of the following crime :

THIRD COUNT: Sodomy in the Second Degree, in violation of Section 130.45 of the Penal Law of the State of New York, a Class D Felony, in that the defendants, sometime during the months of June through September, 1977, in a parking lot in the County of Albany, State of New York, did being eighteen years old or more, engage in deviate sexual intercourse with another person less than fourteen years old, to wit: at the aforesaid date, time and place, the defendant, Theodore Pepper being aided by the defendant, Mary Angus, engaged in deviate sexual intercourse consisting of placing his penis in the mouth of one Kathleen Valenti, a person less than fourteen years of age.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendants of the following crime:

FOURTH COUNT: Sexual Abuse in the Second Degree, in violation of Section 130.60 of the Penal Law of the State of New York, a Class A Misdemeanor in that the defendants, sometime during the months of June through September, 1977, in the parking lot of the A & P on Johnson Road, in the Town of Colonie, County of Albany, State of New York, did subject another person to sexual contact when such other person was less than fourteen years of age, to wit: at the aforesaid date, time and place, the defendant, Theodore Pepper, being aided by

the defendant, Mary Angus, caused the hand of one Kathleen Valenti, who was less than fourteen years of age, to touch the penis of the defendant, Theodore Pepper.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendants of the following crime :

FIFTH COUNT: Sexual Abuse in the Second Degree, in violation of Section 130.60 of the Penal Law of the State of New York, a Class A Misdemeanor in that the defendants, during the month of September, 1977, in the parking lot of GEX in the Town of Colonie, County of Albany, State of New York, did subject another person to sexual contact when such other person was less than fourteen years of age, to wit: at the aforesaid date, time and place, the defendant, Theodore Pepper, being aided by the defendant, Mary Angus, touched with his hand or hands, the vagina of one Kathleen Valenti, a female less than fourteen years of age.

s/ illegible
Assistant District Attorney
Albany County

GRAND JURY INDICTMENT.

No. 34

COUNTY OF ALBANY

. . . . . .COUNTY . . . . . .COURT

The People
against
MARY ANGUS and
THEODORE PEPPER,

Defendants.

INDICTMENT
(see inside)

s/ illegible

Ass't *District Attorney.*

A TRUE BILL

s/ MARTIN G. illegible, JR.

Foreman.

Filed 22nd *day of* November, 1978
Arraigned *day of* *19*
Plead *Guilty*
Tried *day of* *19*
Verdict
Sentence

Counsel *Retained* / *Assigned* *for Defendant*

SIGNED STATEMENT OF DEFENDANT PEPPER.

VOLUNTARY STATEMENT

STATE OF NEW YORK
COUNTY OF ALBANY
Town of Colonie

Date 11/17/78 Time 12:30PM Place SP Loudonville, N.Y.

I, Theodore NMN Pepper, am 42 years of age, born on 1-3-36

my address is 31 Folmsbee Drive, Menands, N. Y.

my occupation is Owner of Ted Pepper Chrysler Plymouth, Latham, NY

I have been duly warned by Inv. F. P. Connelly who has identified himself as An Investigator of the New York State Police

that I do not have to make any statement at all, and that any statement I make may be used in evidence against me in a court of law, and that I have the right to talk to a lawyer for advice before making this statement or answering any questions, and that I have the right to have an attorney appointed to represent me if I cannot afford one before making this statement or answering any questions and that I can stop giving the statement or stop the questioning at any time for the purpose of consulting an attorney. Without fear of threat of physical harm upon me or another person, I freely volunteer the following statement to the aforesaid person.

I believe it was in 1977 I think May or June that Mary Angus a person that I originally meet in about 1972 and had become involved to the point of having sexual intercourse with suggested that I meet her daughter Kathy. Mrs Angus called me at my office and we agreed to meet in the parking lot in the rear of the Shearton Inn, in the City of Albany. I meet Mrs Angus in the parking lot and she had a girl with her that she introduced me to as her daughter Kathy. I had a short conversation with Mrs Angus and then I left. A this first meeting

SIGNED STATEMENT OF DEFENDANT PEPPER.

I had no sexual contact with Kathy at all. Approximately one month later Mrs Angus again called me at my office and we set up a meeting in the parking lot of the A&P market on Johnson Road in Colonie. The meeting occurred in the early afternoon, I meet Mrs. Angus and Kathy, they were in Mrs A ngus's Chrysler Cordoba, I got out of my car and got into the front seat of Mrs. Angus car with Kathy in the middle. At this meeting I fondeled Kathy's breasts and she fondled my penis. This went on for about five or ten minutes, befor I left I gave Mrs. Angus between $400.00 and 600.00 dollars in cash. The next time I meet mrs. Angus and Kathy was in in Early September of 1977, Mrs Angus called me at my office and a meeting was arranged for us to meet in the parking lot of the GEX lot on Rt. 7 in Colonie. The meeting took place in the late morning or early afternoon, Kathy and Mrs Angus came in Mrs Angus Chrysler and I came in my personal car. I again got in the front seat of the car with Kathy between Mrs. Angus and myself, at this meeting I recall Kathy wearing a sweater and dungarees, Kathy unbuttoned her dungarees I think she was wearing panties but I can't recall for sure anyway she got her pants open enough to expose the area of her vagina, I fondeled her about the area of her vagina but I can't recall if I touched or fondeled her breasts. This meeting took about five or ten minutes and before I left I again gave Mrs Angus between $400.00 and $600.00 dollars in cash.

I have read this statements (had this statement read to me) consisting of page(s) and the facts contained herein are true and correct. I have also been told and I understand that making a false written statement is punishable as a Class A misdemeanor

pursuant to Section 210.45 of the Penal Law of the State of New York.

Subscribed and sworn to before me
this 17th day of November, 19 78.

Signed: s/ THEODORE PEPPER
Page 1, of 2 page(s)

Witness: s/ KEVIN W. illegible

Witness: s/ F. P. CONNELLY

Notary Public

SIGNED STATEMENT OF DEFENDANT PEPPER.

VOLUNTARY STATEMENT

STATE OF NEW YORK
COUNTY OF Albany

Page #2

Town of Colonie

Date 11/17/78 Time 12:30PM Place SP Loudonville, N.Y.

Continuation of Statment of Mr.

I, Theodore NMN Pepper, ~~age~~ ~~years of age, born at~~ Pepper.

my address is

my occupation is

I have been duly warned by who has identified himself as

that I do not have to make any statement at all, and that any statement I make may be used in evidence against me in a court of law, and that I have the right to talk to a lawyer for advice before making this statement or answering any questions, and that I have the right to have an attorney appointed to represent me if I cannot afford one before making this statement or answering any questions and that I can stop giving the statement or stop the questioning at any time for the purpose of consulting an attorney. Without fear of threat of physical harm upon me or another person, I freely volunteer the following statement to the aforesaid person.

At the meeting that I had with Mrs. Angus and Kathy at the A&P parking lot during this meeting Mrs. Angus told Kathy to put her mouth on my penis and Kathy did that but it wasn't for long. I would like to say that inbetween these meetings with Mrs. Angus and Kathy Mrs. Angus would call me to ask for some money and I would meet her and give her anywhere from $100.00 dollars to $200.00 or $300.00 dollars in cash. The next time I heard from Mrs. Angus was approximately a month after the GEX meeting, Mrs Angus called me and said

that she needed some money and suggested that I bring it to her house which is off Rt 155 in Colonie or Schenectady, I went to her house and when I got there Mrs. Angus suggested that Kathy and I get to gether, Mrs. Angus told Kathy to take her clothes off, Kathy took off her sweater and bra if she had one on and I told Mrs. Angus that I didn't want Kathy and I told Kathy to relax and forget it. Kathy went out of the house and Mrs. Angus and I had intercourse. I have not seen Kathy for anything since approximately a year ago September 1977. I have not seen Mrs. Angus since approx. one year ago November 1977. In the total time that I saw Mrs. Angus in summer of 1976 to the last time that I saw Mrs. Angus in Nov. 1977 I believe that I gave her approximately five or ten thousand dollars in cash, my reason for giving her all of this money was to buy peace and quiet from her.

I have read this statements (had this statement read to me) consisting of 2 page(s) and the facts contained herein are true and correct. I have also been told and I understand that making a false written statement is punishable as a Class A misdemeanor pursuant to Section 210.45 of the Penal Law of the State of New York.

Subscribed and sworn to before me
this 17th day of November, 19 78.

Signed: s/ THEODORE PEPPER
Page 2, of 2 page(s)

Witness: s/ KEVIN W. illegible

Witness: s/ F. P. CONNELLY

Notary Public

NEW YORK COURT OF APPEALS REMITTITUR.

Remittitur

Court of Appeals
State of New York

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

3 No. 324
The People &c.,

Appellant,

v.
Theodore Pepper,

Respondent.

The appellant(x) in the above entitled appeal appeared by Sol Greenberg, District Attorney of Albany County *the respondent(x) appeared by* Paul E. Cheeseman, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Fuchsberg, J. All concur, Gabrielli, J., in a separate opinion in which Cooke, Ch.J., and Jasen, J., concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Albany County Courthouse.

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 16, *19* 81.